design and purpose to kill, but through the violence of sudden passion occasioned by some great provocation, which in tenderness for the frailty of human nature, the law considers sufficient to palliate the offence; or involuntary, as when the death of another is caused by some unlawful act, not accompanied with any intention to take life." "Every man, when assaulted with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection, and if during that period he attacks his assailant, with a weapon, likely to endanger life, and death ensues, it is regarded, as done through heat of blood or violence of anger and not through malice, or that cold blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice."

From all we have said it will be obvious that the first point of inquiry before the jury, will be in regard to the existence of preconceived malice on the part of the defendant, before he went into the combat. In this view, the nature and character of the wound, and the manner of its infliction, will have an important bearing.

This being got over, the second leading inquiry will be as to the existence of any legal provocation, not as a blow or blows inflicted by the deceased, and the occurrence of hot blood in consequence. The defendant having established the negative of the former, and the affirmative of the latter, or rendered them fairly doubtful in the estimation of the jury, will be entitled to claim a verdict of manslaughter, otherwise he is guilty of murder, from the nature, extent, and consequence of the wound.

The verdict is set aside and a new trial granted.

In the Supreme Court of Wisconsin.

LEMUEL W. WEEKS, APPELLANT, *against* THE CITY OF MILWAUKEE AND OTHERS, RESPONDENTS.

1. The system of making city improvements by Cities, by grading and improving streets, and taxing the owners of lots therefor by the front foot, is constitutional.
2. The judiciary have no power to inquire into or correct any matter of enlargement of city boundaries by annexation of new territory made by the Legislature, as that is a matter within their discretion; and when such territory is annexed, it must be taxed the same as other lands within the city limits.

3. The City cannot create a nuisance upon the plaintiff's lots and then tax him for abating it.

4. The exemption of the Newhall House (a large hotel) from taxation, by the common council, was without authority of law, and vitiates the entire tax for the year of such exemption.

E. G. Ryan, of counsel for plaintiff.
H. F. Prentiss, attorney for plaintiff.
Nelson Cross, of counsel for the City.
Geo. A. Woodward and *H. L. Palmer*, City attorneys.

The opinion of the court was delivered by

PAINE, J.—This action was brought by the appellant to restrain the sale of a large quantity of real estate, for taxes, upon several alleged grounds of illegality. A large share of the real estate consisted of city lots, and a corresponding share of the taxes was for assessments against these lots, for building streets, sidewalks, &c., under the charter of the city.

The most important objection urged against their legality, is that the provisions of the charter itself, authorizing these assessments, are a violation of the constitutional provision that the rule of taxation shall be uniform. I have no doubt if these assessments are to be sustained at all, that it must be done upon the ground that they are an exercise of the taxing power. It is true there are many cases in which it has been said that they are not taxes. But when Justice Barculo, in the *People* vs. *Brooklyn*, 6 Bar. 209, carried out this doctrine to its logical result, and held that not being taxes, they were the taking of private property for public use without compensation, the Court of Appeals, in order to avoid his conclusion, were compelled to uphold them as an exercise of taxing power. 4th Com. 419. I have also no doubt that the constitutional provision, that the rule of taxation shall be uniform, extends to taxation by cities, towns and counties, exercising as they do a portion of the sovereign power, delegated to them by the State. It is true, as I had occasion to contend in the case of *Clark* vs. *The City of Janesville*, that most of the provisions of article 8, where this is found, apply to the action of the State, as such, and not to the

action of its minor political divisions. A city or county is not a State, and if it contracts a debt, that is not a State debt. But when either exercises the taxing power, it is acting for the State, as taxation is an attribute of sovereignty. When, therefore, the Constitution requires the rule of taxation to be uniform, I think it extends to all taxation by the State, whether acting directly, or by delegating its authority to political corporations. The object of this provision was to protect the citizen against unequal, and consequently unjust taxation. And this object would clearly be defeated if the State, by delegating the power, placed its agents beyond the restriction of the rule. And this view, I think, is not impaired by the provision of Art. XI. Sec. 3, requiring the Legislature, in establishing municipal corporations, to restrict their powers of taxation so as to prevent abuses, &c. Restrictions may be, and undoubtedly are, necessary to prevent abuses which might not amount to violations of the rule of uniformity. There may be a uniform abuse of the taxing power, by reckless and improvident management on the part of these local authorities, and I think the provision last mentioned was designed to furnish a further protection, in addition to that furnished by the rule of uniformity.

Believing, therefore, that these assessments are an exercise of the taxing power of the State, and that the rule of uniformity extends to taxation by corporations, I should find it impossible to uphold them, if the provision requiring the rule to be uniform was the only provision in the constitution bearing upon the question. I think, with Chief Justice Bartley, in *Bank* vs. *Hines*, 3 Ohio St. Rep. 15, that "uniformity in taxing implies equality in the burden of taxation." This equality in burden constitutes the very substance designed to be secured by the rule. But the principle upon which these assessments rests, is clearly destructive of this equality. It requires every lot owner to build whatever improvements the public may require on the street in front of his lot, without reference to inequalities in the value of lots, in the expense of constructing the improvements, or to the question whether the lot is injured or benefited by their construction. Corner lots are required to construct and keep in repair three times as much as other lots, and

yet it is well known that the difference in value bears no proportion to this difference in burden. In front of one lot the expense of building the street may exceed the value of the lot, and its construction may impose on the owner additional expense to render his lot accessible. In front of another lot of even much greater value, the expense is comparatively slight. These inequalities are obvious, and I have always thought that the principle of such assessments was radically wrong. They have been very extensively discussed, and sustained upon the ground that the lot should pay because it receives the benefit. But if this be true, that the improvements in front of a lot are made for the benefit of the lot only, then the right of the public to tax the owner at all for that purpose fails. Because the public has no right to tax the citizen to make him build improvements for his own benefit merely. It must be for a public purpose, and it being once established that the construction of streets is a public purpose, that will justify taxation. I think it follows, if the matter is to be settled upon principle, that the taxation should be equal and uniform, and that to make it so, the whole taxable property of the political division in which the improvement is made, should be taxed by a uniform rule, for the purpose of its construction. But in sustaining these assessments, when private property was wanted for a street it has been said the State could take it, because the use of a street was a public use; in order to justify a resort to the power of taxation, it is said the building of a street is a public purpose. But then having got the land to build it on, and the power to tax by holding it a public purpose, they immediately abandon that idea, and say it is a private benefit, and make the owner of the lot build the whole of it. I think this is the same in principle as it would be to say that the town in which the county seat is located should build the county buildings, or that the county where the capital is, should construct the public edifices of the State, upon the ground that by being located nearer, they derive a greater benefit than others.

If the question, therefore, was whether the system of assessment could be sustained upon principle, I should have no hesitation in deciding in the negative. I fully agree with the decision of the

Supreme Court of Louisiana in the case of *Municipality No. Two* vs. *White et al.*, 9 Louis. Rep. 447, upon this point.

But the question is not, whether this system is established upon sound principles, but whether the Legislature has the power, under the Constitution, to establish such a system. As already stated, if the provision requiring the rule of taxation to be uniform was the only one bearing upon the question, I should answer this, also, in the negative. But there is another provision, which seems to me so important that it has changed the result to which I should otherwise have arrived. That provision is Sec. 3 of Art. XI., and is as follows:—"It shall be the duty of the Legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in *assessments* and taxation, and in contracting debts by such municipal corporations."

It cannot well be denied, if the word assessment, as used in this section, had reference to this established system of special taxation for municipal improvements, that then it is a clear recognition of the existence and legality of the power. Had it such meaning? I think it had, for the following reasons:—This system of special taxation, upon the basis of supposed special benefits, had existed for years and given rise to much discussion and litigation in the older States. Although in itself being strictly an exercise of the taxing power, yet it has been frequently assumed otherwise, and has been so far separated and distinguished from a general taxation as to have obtained a distinct name, and that name assessment. As such, it has been known and described for a number of years in the older States, in their contracts, laws and constitutions. A clear distinction between it and other taxation was established.

It seems to me therefore that when the Constitution expressly recognizes the "power of assessment" in municipal corporations, it had reference to this system which had been so long known and described under that name. I know of nothing else to which it could have reference. It was suggested on the argument, that it meant the assessments of taxes generally. But I cannot see how

this idea can be sustained when the word "taxation," which includes all the steps necessary to taxation, immediately precedes the word "assessment." It is said, "the Legislature may 'restrict' their power of taxation, assessment, borrowing money," &c. Now to say that the word "assessment" as here used had reference to the assessment of taxes generally, is to make the instrument guilty of a useless as well as awkward repetition. Having first covered the whole ground by the word "taxation" it would then go back over a part of it again, by the word "assessment," which is only a step in taxation. Such a use of language would be exceedingly constrained and unusual in any instrument, and particularly so in a Constitution, which usually deals in general terms without going into details. If any tautology at all was to be looked for there, it should be in the use of some word of equivalent meaning to the one already used, and not of one expressing only a small part of it. I think also that the word assessment, having reference to the general assessment of taxes, has never in common practice been used alone, as expressing that idea; on the contrary, when that is the idea to be conveyed, it is said the "assessment of taxes," as men say the "levying of taxes," or the "collection of taxes." But it has an established meaning when used alone, and that is this specific taxation. The word "assessment" then includes all the steps necessary to this word taxation, just as the word "taxation" includes all necessary steps to taxation generally. And when I find the Constitution recognizing in municipal corporations the power of "taxation" *and* "assessment," I cannot resist the conclusion that this latter word had reference to that particular species of taxation known as a whole by that name. And if it did, it is a clear recognition of the power, and the question here being only as to the power, is conclusively determined by it.

The same effect was given to the same clause in the Constitution of Ohio, by the Supreme Court of that State, in a recent decision in the case of *Hill* vs. *Higdon*, 5 Ohio State Reports 243, and the reasoning of Chief Justice Raney upon the question, I think it impossible to answer. This provision then, recognizing the power of assessment in municipal corporations, is so far a modification of

the rule of uniformity, as the system of assessment is a departure from that rule. And the principle of it being, as before stated, to compel every lot to build the streets in front of it, with such exceptions as are usually provided in case of extraordinary expense, and which exist in the charter of Milwaukee, it cannot be said that under the Constitution constructing the two sections together, and giving due effect to both as we are bound to, the Legislature has not the power to authorize these assessments. For whatever abuses may be practiced under it, and they are doubtless great, the only remedy is in such restrictions as the wisdom of the Legislature may impose on the exercise of the power, and for every citizen of these corporations to faithfully discharge his duty as such, and give necessary attention to the administration of public affairs, and not leave them to the exclusive management of plundering mercenaries, and then groan under the oppression of that result.

Another alleged ground of illegality is, that certain farming lands of the plaintiff, which had never been laid off into lots, and were not needed for city purposes, had been annexed to the city by an act of the Legislature, and afterwards taxed at the same rate as other city property. I think this question resolves itself entirely into a question whether the Legislature has power to annex adjoining territory to a municipal corporation. Because, if such power exists, and this land *was* annexed, it seems very clear that it must afterwards be taxed by the same rule as other property in the political division where it then belongs. The rule of uniformity would require this. And we have held at the present term, in the case of *Knowlton* vs. *Supervisors of Rock County*, that no discrimination could be made in such case, between lands in the same taxing district, so that a part should be taxed at one rate upon their value and the rest at another. And this seems so clear that while counsel apparently conceded that the Legislature might annex the lands for some purposes, he yet claimed that they could not do it for taxing purposes; but for these, it was still a part of the town in which it was previously located. But I think this position cannot be sustained. Such a rule would be impracticable, and to sustain such a double ambiguous character for any district, must lead to

great confusion and uncertainty. If the power exists to annex, when it is exercised, the district must be annexed for all purposes. Whether it is a wise or just exercise of the power, courts cannot inquire; those are questions for the Legislature. Parties owning lands upon the borders of cities must hold them subject to their disadvantages as well as advantages. If, when they are first annexed, they are subject to undue burdens, this is perhaps in some measure compensated by the fact that before being annexed they had long enjoyed great advantage from their vicinity to a prosperous city, without contributing anything towards the burdens of building it. But an objection is made to the legality of the general tax of that year, which I am compelled to sustain. It appears from the case that several lots in the city, upon which the Newhall House was in process of erection, of the value of from $150,000 to $200,000, were purposely omitted to be taxed, and no State, county, city or school tax levied or assessed upon them. It appears from the complaint and stipulation of the parties, that this omission was intentional on the part of the city authorities, and it was conceded on both sides that an ordinance was passed by the common council expressly exempting that property from taxation for the years 1856 and 1857, "in view of the great public benefit which the construction of the hotel would be to the city."

I have no doubt this exemption originated in motives of generosity and public spirit. And perhaps the same motives should induce the tax-payers of the city to submit to the slight increase of tax thereby imposed on each, without questioning its strict legality. But they cannot be compelled to. No man is obliged to be more generous than the law requires, but each may stand strictly upon his legal rights.

That this exemption was illegal, was scarcely contested. I shall therefore make no effort to show that the common council had no authority to suspend or repeal the general law of the State, declaring what property shall be taxable and what exempt. But the important question presented, is whether, conceding it to have been entirely unauthorized, it vitiates the tax assessed upon other property? And upon this question, I think the following rule is

established, both by reason and authority. Omissions of this character arising from mistakes of fact, erroneous computations or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws in such manner as to impose illegal taxes on those who are assessed, does. The first part of the rule is necessary to enable taxes to be collected at all. The execution of these laws is necessarily entrusted to men, and men are fallible, liable to frequent mistakes of fact, and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties should vitiate the whole tax, no tax could ever be collected. And therefore, though they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided, is absolutely essential to the continuation of government. But it seems to me clear that the other part is equally essential to the just protection of the citizen. If those executing these laws may deliberately disregard them, and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers who by being appointed to execute the laws, would seem to be placed thereby beyond legal control. I know of no considerations of public policy or necessity that can justify carrying this rule to that extent. And the fact that in this instance the disregard of the law proceeded from good motives, ought not to affect the decision of the question. It is a rule of law that is to be established. And if established here, because the motives were good, it would serve as a precedent when the motives were bad, and the power usurped for purposes of oppression. In *Henry* vs. *Chester*, 15 Verm. 560, the court says:

"It is indispensable to the legality of any tax imposed by the town, that it should have been made upon a list of the polls, and ratable estate of the inhabitants, in substantial and bona fide compliance with the requisitions of the statute."

And again, upon two grounds, then, we think this was a void list. 1st. The plain and obvious requisitions of the statute in regard to making up the list were disregarded both by important and essen-

tial *omissions*, and by *arbitrary additions* without even the color of right or legal warrant. If this may be done, and still the list be regarded as legal, so might it with equal propriety, if the entire real estate in town were omitted, or inserted wholly at random without even the form of an appraisal."

The court also quotes the following rule as stated by Chief Justice Shaw, in *Torrey* vs. *Millbury*, 21 Pick. 65: "One rule is very plain and well settled, that all those measures which are intended for the security of the citizen, for securing an equality of taxation, &c., are *conditions precedent*, and if they are not observed, he is not legally taxed, and he may resist it." True, the court then adds, as a qualification of the general proposition, that these measures, in order to become "conditions precedent," must be such matters as enter into the frame work of the assessment, and affect its principle, and not its detail merely. But it is evident, from the remark before quoted, that they considered important and essential *omissions*, "without the color of right or legal warrant," as having such effects. And it seems very evident that they would have; because one of the essential elements of the validity of a tax is that it should be assessed upon a list embracing the taxable property of the district, made out with as much accuracy as results from a bona fide attempt on the part of those who make it to fulfill their duty according to law. And when such a list is not had, but instead of it, one in which those whose duty it was to make it have intentionally included only a part of the taxable property, and left out an important part, the essential basis of a legal tax fails, and the necessary result is a destruction of that "equality of taxation," all the "measures" to secure which, in the language of Chief Justice Shaw, are "conditions precedent" to the legality of the tax.

In the subsequent case of *Spear* vs. *The Town of Braintree*, 24 Verm. 414, the same rule was re-asserted; though in that case they held the error complained of to be a mere error in judgment, in a bona fide attempt to fulfill the duties of the office according to law; and they distinguished it from the case of *Henry* vs. *Chester*, by saying: "That case was decided as it was, chiefly upon the ground that the defects in the list could not be fairly regarded as acciden-

tal or bona fide." In *The State* vs. *Brannin*, 3 Zab. N. J. Rep. 484, it was held, that where an assessment was made in the city of Trenton, for city and county purposes, a separate poll tax being required by law for the city tax, and only one poll tax was assessed, the whole assessment was void.

In the subsequent case of *The State* vs. *The Collector of Jersey City*, 4 Zab. 108, the assessor had omitted to assess the churches, and the court held that it did not avoid the whole tax. But they placed it upon the ground that it was a practice that had universally prevailed in the State, and in accordance with a contemporaneous construction of the law, "which they would probably have sanctioned had the question been formally raised." It is true, they add, that for an omission to assess property really taxable, the assessment ought not to be held void, but that is a matter to be left to the vigilance of the assessor. But they qualify this by adding, "unless it be in cases involving a palpable and greatly injurious disregard or misconstruction of plain requirements of the law."

But the counsel for the city rely strongly on the case of *Page* vs. *The City of St. Louis*, 20 Mo. 136. In that case an act of the legislature had established a system of sewerage in St. Louis, and provided that the real estate in each district should be taxed annually to pay the debt, for which the city was authorized to issue its bonds. The city passed an ordinance for the creation of a sewerage fund, and providing that any of the tax payers who would pay into this fund such proportion of the whole debt as the assessed valuation of his taxable property bore to the whole assessed valuation of his district, should be thereafter exempt.

A certain party had availed himself of this privilege, and afterwards placed further improvements on his property, rendering it more valuable, and it was no longer taxed for the sewerage debt. The plaintiff, who was taxed, complained that this exemption vitiated his tax. But the court decided against him, expressly on the ground that it did not appear that his tax was at all increased by the exemption, nor that the party who had advanced his proportion of the whole debt had not paid all that he ought to pay. But this case is entirely different; for here it is conceded that the plaintiff's

tax, as well as that of all the other tax payers, was increased by the omission of the Newhall House property. It is true, the court indulges in some general remarks on the inconvenience of arresting the proceedings of a city, and closes by saying, "The right of a corporation *de facto* will be enforced. It is no defence to the claim of a corporation that it has violated its charter." If by this it was only meant that when a corporation is enforcing a legal claim, it is no defence to say it has violated its charter in some other matter, that may be conceded. But if it was meant to say that, when a corporation is enforcing an illegal claim, which is itself a violation of its charter and the law, and works injustice upon the defendant, it is no defence to show such violation, I, for one, must be permitted to dissent. I do not understand that even to avoid a suspension of corporate proceedings, it is proper to break down all barriers against illegal taxation, and say that a city may enforce the collection of an illegal tax just as well as though it were legal.

In *Wiggins* vs. *New York*, also cited, the decision is only that the Court of Chancery would not interfere on account of errors of judgment in the commissioners assessing benefits and damages on opening streets, the proceedings having been regular. And in examining some of the alleged irregularities, the court sustained the proceedings, on the ground that they did not "increase the assessments" upon others, implying, if they had they must be illegal.

The case of *The Ins. Co.* vs. *Yard*, 17 Penn. St. Rep. 321, was evidently a case of omission of a part of the taxable property from mistake or ignorance of the fact on the part of the assessors. The language of the court contemplates only such omission, and contains nothing which shows they would have held the same in regard to an intentional omission on the part of all the authorities levying and collecting the tax, of a large portion of taxable property, and assessing its proportion upon the other tax payers.

In *Williams* vs. *School District*, 9 Pick. 75, the assessors had omitted to tax one of the inhabitants of the district, because he was very poor, and they expected he would soon come upon the town. The court says: "If this was done through error of judgment, or any error and mistake of the law in this respect, it does not invalidate the whole tax, and the case shows nothing more."

I understand the "error of judgment" here referred to, to mean only such errors on the part of officers as to what the law required of them, and not an error of judgment by which, knowing what the law was, they supposed they had a right to repeal or suspend it. It cannot be said here that the omission occurred from an error of judgment, by which it was supposed that the Newhall House property was not taxable by law. The very fact of passing an ordinance to exempt it, implies knowledge that it was taxable. The only error of judgment here was in supposing they had a right to suspend the law, and relieve a part of the taxable property, and impose an additional burden on the rest.

Nor do I think that provision of the law that where there has been an omission to tax property, it may be taxed the proper amount the next year, should change the result. That evidently refers to such omissions as are constantly liable to happen, but which do not invalidate the tax assessed. But where the omission originates in an intentional departure from the law on the part of all the authorities, and is of such a character as renders the tax illegal, I do not think this provision can cure it; for it cannot be assumed that those who paid the illegal tax would continue tax payers long enough to get back substantially what they had paid under the operation of this provision. The only question, in my judgment, is, whether the tax is legal or not.

I am also of the opinion, that the tax assessed against the plaintiff's lots, to abate a nuisance, which it appears was created entirely by the acts of the city in so constructing a street as to cause the water to flow and remain upon the spots, which it would not otherwise have done, is illegal. I cannot recognize the right of a corporation to create a nuisance on the lot of an individual; but to create the nuisance, and then tax him to abate it, is a double wrong. I shall not attempt any examination of the question upon authority, but I am satisfied such a right cannot be sustained. I think this conclusion results from the reasoning of Mr. Justice Smith, in *Goodall* vs. *Milwaukee*, 5 Wis. 32, which I fully approve; and until I am prepared to say that private rights must yield even to the extent of total destruction rather than place any impediment in the way of

whatever proceedings corporations may see fit to take, I cannot say that a city may create a nuisance on the lot of a citizen, without making him any compensation for the damages, and then tax him to abate it.

We were pressed, as courts always are on such occasions, to make a decision that would avoid the inconveniences resulting from holding the tax illegal. These inconveniences may not be as great as was supposed. It would not follow from such a decision that those who had voluntarily paid it could recover it back. But whatever they may be, I am sure they cannot exceed the evils of holding that the citizen has no protection against illegal taxation. Courts have too frequently yielded to such appeals, and to avoid some immediate inconvenience, have decided cases differently from what they otherwise would, overlooking the more remote, but at the same time greater evils of bad precedents in the introduction of a pernicious principle into the administration of justice.

I think the plaintiff was entitled to an injunction restraining the sale of his lands for the general tax, which was increased by the illegal exemption, and for the nuisance tax, but not for the other assessments, and that the judgment should be reversed, with costs.

The judgment is reversed, and cause remanded for further proceedings.

RECENT ENGLISH DECISIONS.

In the Divorce and Matrimonial Causes Court.

WHITE *vs.* WHITE.

The husband will be entitled to the protection of the court, where the wife's passions, from whatever cause, are so little under control that she is in the habit of using personal violence to the husband, from which habit he may be in danger of bodily injury, though no actual serious injury has been inflicted.

This was a petition for judicial separation, at the suit of the husband, by reason of the wife's cruelty. It appeared that she was easily excited by drink, and in that condition had frequently used